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ARIZONA CORPORATION COMMISSION  
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Arizona Corporation Commission  
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**BEFORE THE ARIZONA CORPORATION COMMISSION**

**COMMISSIONERS**

**BOB STUMP, Chairman**  
**GARY PIERCE**  
**BRENDA BURNS**  
**BOB BURNS**  
**SUSAN BITTER SMITH**

IN THE MATTER OF THE TOWN OF  
FOUNTAIN HILLS' FORMAL  
COMPLAINT AGAINST CHAPARRAL  
CITY WATER COMPANY.

Docket No. W-02113A-14-0359

**TOWN OF FOUNTAIN HILLS'  
RESPONSE TO STAFF'S MOTION  
TO DISMISS**

A.R.S. §40-246(C) requires the Commission to set a hearing on the reasonableness of a public service corporation's rates and charges when a complaint is filed pursuant to A.R.S. §40-246(A). Staff's motion is improper and meritless because it seeks to circumvent the requirements of A.R.S. §40-246.

Arizona law provides a method for municipalities, like the Town of Fountain Hills ("Town" or "Fountain Hills"), to seek Commission review and oversight if a public service corporation is in violation of any provision of law—A.R.S. §40-246. The Town's Complaint alleges that Chaparral City Water Company's ("CCWC") rates are unreasonable and illegal under the Arizona Constitution, so the Town is entitled to a hearing on its Complaint and Staff's Motion should be denied.

1           **I. STAFF'S MOTION SHOULD BE DENIED.**

2           Motions to dismiss are disfavored in Arizona. *Acker v. CSO Chevira*, 188 Ariz.  
3 252, 255, 934 P.2d 816, 819 (App. 1997.) "A court should not grant such a motion  
4 unless it appears certain that the plaintiff would not be entitled to relief under any state  
5 of facts susceptible of proof under the claim stated." *Id.* When adjudicating a motion to  
6 dismiss, the Commission must "assume the truth of the well-pled factual allegations and  
7 indulge all reasonable inferences therefrom." *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz.  
8 417, 419, 189 P.3d 344, 419 (2008).

9                   **A. A.R.S. §40-246(C) requires a hearing on the reasonableness of**  
10                   **CCWC's rates, so a motion to dismiss is improper and meritless.**

11           A.R.S. §40-246(C) states that "[u]pon filing the complaint, the commission **shall**  
12 set the time when and place where a hearing will be had upon it . . ." (emphasis added).  
13 Use of the word "shall" in a statute "indicates a mandatory intent by the legislature."  
14 *Insurance Co. of North America v. Superior Court*, 166 Ariz. 82, 85, 800 P.2d 585, 588  
15 (1990). Thus, A.R.S. §40-246(C) requires the Commission to conduct a hearing on the  
16 reasonableness of rates when an A.R.S. §40-246(A) complaint is filed. Staff's Motion  
17 seeks to avoid the hearing required by statute, so it is improper and under the plain  
18 language of the statute should be denied.

19           The Attorney General Opinion cited by Staff also states that a hearing is  
20 required. Staff cites Attorney General Opinion 69-6 in support of its Motion, but the  
21 Attorney General's Opinion supports the Town's request for a hearing on its Complaint,  
22 not Staff's Motion ("AG Opinion"). [Exhibit A.] In fact, the AG Opinion states that  
23 the statute requires the Commission to conduct a hearing regarding the reasonableness  
24 of rates, which is the relief requested by the Town in its Complaint.

25           The requested relief is available to the Town under A.R.S. §40-246. As noted  
26 above, the Commission is required by the statute to set a hearing on the reasonableness

1 of CCWC's rates. *See* A.R.S. §40-246(C). The Town's Complaint requested such a  
2 hearing in its request for relief. [Complaint at p. 9, ll. 22-23.] If the Commission  
3 determines that CCWC's rates are unreasonable, then the Commission certainly has the  
4 authority to thereafter set reasonable rates and charges, as requested in the Town's  
5 Complaint.

6 **B. The Town's Complaint sets forth a valid cause of action and alleges**  
7 **multiple violations of Arizona law by CCWC.**

8 A.R.S. §40-246 provides that a complaint may be filed against a public service  
9 corporation for "**violation, of any provision of law** or any order or rule of the  
10 commission . . ." (emphasis added). Contrary to Staff's contention, the scope of A.R.S.  
11 §40-246 does not only address violations of "regulatory requirements." The complaint  
12 may also allege the violation of "any provision of law." The Town's Complaint alleges  
13 multiple violations of law by CCWC.

14 Count One of the Complaint cites Article 15, Section 12 of the Arizona  
15 Constitution which requires that all "charges made for service rendered, or to be  
16 rendered, by public service corporations within this state shall be just and reasonable . .  
17 ." [Complaint at ¶ 38.] Paragraph 40 of the Complaint then alleges "CCWC's rates and  
18 charges are unjust and unreasonable and are in violation of Article 15, Section 12 of the  
19 Arizona Constitution."

20 Count Two of the Complaint alleges that CCWC's SIB surcharge is in violation  
21 of the fair value requirement of Article 15, Section 14 of the Arizona Constitution.  
22 [Complaint at ¶¶ 42-46.] Paragraph 47 of the Complaint states "CCWC's SIB  
23 surcharge is unconstitutional because it permits annual rate increases without  
24 Commission examination of CCWC's fair value and its costs and revenue and allows  
25 rate increases between rate cases."  
26

1 Staff cites to *State v. Public Service Comm'n of Missouri*, in support of its  
2 argument that a violation of law must be alleged to sustain a complaint under A.R.S.  
3 §40-246. 924 S.W.2d 597 (1996). The case is irrelevant because the Town's complaint  
4 alleges multiple violations of Arizona law by CCWC.

5 The motion to dismiss standard requires that the allegations in the Town's  
6 Complaint be taken as true. The Town's allegations that CCWC's rates and charges are  
7 unreasonable and in violation of the Arizona Constitution, if proven, would entitle the  
8 Town to the relief it seeks. Thus, Staff's Motion should be denied.

9 **C. The Town's Complaint is against CCWC, not the Commission.**

10 Staff's Motion erroneously asserts that the Town's Complaint is against the  
11 Commission, not CCWC. The Mayor and Town Council of Fountain Hills filed the  
12 Complaint against CCWC alleging that CCWC's rates and charges are unreasonable  
13 and in violation of the Arizona Constitution.

14 Staff's argument that the Town's Complaint is really against the Commission,  
15 not CCWC, is based on a misunderstanding of A.R.S. §40-246. A.R.S. §40-246  
16 provides a formal process for a community to complain to the Commission about a  
17 public service corporation's rates. Communities and groups of rate payers are best  
18 situated to recognize the unreasonableness of a public service corporation's rates and  
19 charges, as they apply to a particular community. The Town of Fountain Hills and its  
20 citizenry know more about the reasonableness of CCWC's rates, as applied to Fountain  
21 Hills, than any other party, so Arizona law deliberately provides a method for  
22 communities and rate payers to challenge rates they believe are unreasonable—A.R.S.  
23 §40-246.

24 Staff cites to A.R.S. §40-253, §40-254 and §40-254.01 and faults the Town for  
25 not appealing Decision No. 74568 to the Arizona Court of Appeals to support its  
26 argument that the Town's Complaint is really against the Commission, not CCWC. If

1 the Commission were to follow Staff's argument, all complaints under A.R.S. §40-246  
2 would be against the Commission, because all rates and charges are set by the  
3 Commission and, therefore, challenge Commission decisions. Furthermore, though  
4 Fountain Hills could certainly have filed an appeal or joined in RUCO's appeal under  
5 the statutes referenced by Staff, its decision not to does not preclude the Town from  
6 filing a complaint under A.R.S. §40-246. The filing of a complaint under A.R.S. §40-  
7 246 is an entirely separate process from appealing a Commission order under the  
8 statutes referenced by Staff. There is nothing in A.R.S. §40-253, §40-254 or §40-  
9 254.01 precluding the Town's complaint under A.R.S. §40-246. Neither Staff nor  
10 CCWC have cited to any Arizona law precluding a municipality from filing a complaint  
11 under A.R.S. §40-246 to challenge a public service corporation's rates whether the rates  
12 were set by the Commission two weeks or two years prior. This is because if such a law  
13 existed, A.R.S. §40-246 would be rendered meaningless. A.R.S. §40-246 was enacted  
14 by the Arizona Legislature as a safeguard for rate payers to seek the Commission's  
15 protection when a utility is using its monopoly power unfairly.

16 **D. CCWC's rates are unreasonable and unconstitutional.**

17 Epcor Water USA Inc. ("Epcor") purchased CCWC in 2010 for \$35 million and  
18 the Commission approved the purchase in April 2011. See  
19 [http://corp.epcor.com/News/2011/Pages/jun-01-chaparral-city-water-company-](http://corp.epcor.com/News/2011/Pages/jun-01-chaparral-city-water-company-acquisition-complete.aspx)  
20 [acquisition-complete.aspx](http://corp.epcor.com/News/2011/Pages/jun-01-chaparral-city-water-company-acquisition-complete.aspx). Epcor, owned by the City of Edmonton, Alberta, Canada, is  
21 the largest private water company in Arizona and New Mexico and has "more than  
22 doubled" its dividend to Edmonton since 1996. See  
23 <http://corp.epcor.com/about/Pages/who-we-are.aspx>.

24 Epcor is a sophisticated, profitable utility and its 35 million dollar purchase price  
25 for CCWC was undoubtedly based upon an appraisal and valuation of CCWC's  
26 facilities at the time of the purchase. Now, Epcor will charge Fountain Hills' an

1 additional 19.23% by 2019 via its SIB Charge, in addition to its other numerous rates  
2 and charges, to pay for infrastructure improvements to a system it purchased barely  
3 three years ago. [Complaint at ¶ 20.] In other words, Epcor is now forcing the Town  
4 and its citizenry to pay for infrastructure improvements to a system it recently  
5 purchased at a price which undoubtedly reflected the state of CCWC's infrastructure at  
6 the time of the purchase.

7 Furthermore, CCWC has admitted that it does not need the 19.23% SIB charge it  
8 is imposing on the Town. CCWC's engineer admitted under oath at the hearing before  
9 ALJ Teena Jibilian that the plant recovery associated with the SIB infrastructure charges  
10 could wait until the next rate case. Specifically, CCWC's engineer, Candace Coleman,  
11 testified:

12 Q. Let me ask you, Ms. Coleman, why can't the company  
13 make the repairs and the improvements and then request  
14 recovery in the next rate case, which is the traditional way  
15 things are done?

16 A. We could. [Hearing Transcript at 498-499.]

17 It is unreasonable for CCWC to charge Fountain Hills for infrastructure improvements  
18 to a system it recently purchased at a discount and to charge an unconstitutional SIB  
19 charge it has admitted it does not need.

20 The SIB charge is unfair to rate payers because it is an obscure charge that rate  
21 payers are not accustomed to. The Town and its citizenry focused on contesting  
22 CCWC's general rate increase request and submitted evidence regarding the general  
23 rate increase. Unbeknownst to the Town and its citizenry, however, CCWC was  
24 seeking a SIB charge that will double the general rate increase granted to CCWC by  
25 2019. This obscure charge was not adequately disclosed nor was it sufficiently  
26 explained to rate payers during the rate setting process by CCWC. The Town did not  
learn that the SIB charge would increase rates by an additional 19.23% until August

1 2014, despite the Town's participation in CCWC's rate case, submittal of evidence  
2 regarding the general rate increase and the Town's attendance at the Commission's  
3 Open Meeting on June 20, 2014.

4 CCWC's more than 85% equity rich capital structure further contributes to the  
5 unreasonableness of the rates CCWC charges Fountain Hills and its citizenry. The  
6 Commission has previously expressed concern regarding CCWC's equity rich capital  
7 structure and its affect on the rates it charges. Commissioner Brenda Burns, joined by  
8 Commissioner Bob Burns, moved to reconsider CCWC's rates because she did not  
9 believe that CCWC's equity rich capital structure's affect on rates was adequately  
10 considered when the Commission set CCWC's rates. The Commission even ordered  
11 CCWC to make plans to "rectify the imbalance in its capital structure." [Decision No.  
12 74568 at p. 34.]

13 The best method for rectifying CCWC's imbalanced, equity rich capital structure  
14 would be for CCWC to invest some of its equity into its own infrastructure  
15 improvements, instead of requiring its rate payers to pay for the improvements without  
16 the benefit and Commission oversight of a rate case. Finally, Epcor's ploy to purchase  
17 CCWC at a discount and then immediately impose infrastructure improvements to its  
18 system on its rate payers should not be rewarded.

19 It is CCWC, not the Commission, imposing its unreasonable rates on Fountain  
20 Hills. CCWC is responsible for the rates it charges, not the Commission, because it is  
21 CCWC that requested, lobbied and advocated for its unreasonable rates. The Arizona  
22 Constitution requires CCWC to charge "just and reasonable" rates for its services. Ariz.  
23 Const. Art. 15, § 12. The Town's Complaint alleges that CCWC's rates are in violation  
24 of the Arizona Constitution and the Town is entitled to a hearing on its Complaint.

25  
26 \\\

1 CONCLUSION

2 For the foregoing reasons, Staff's Motion should be denied and a procedural  
3 order should be issued scheduling a hearing as required by A.R.S. §40-246(C) on the  
4 Town's Complaint.

5 DATED this 13th day of January, 2015.

6 GUST ROSENFELD P.L.C.

7 By: 

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